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No. 90-447

In the Supreme Court of the United States

OCTOBER TERM, 1990

SALSBURY INDUSTRIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, after a United States district court ordered that performance of a Postal Service contract be suspended, the Service properly terminated the contract pursuant to a clause providing that it may be "terminated by the Postal Service * * * whenever the Contracting Officer shall determine that such termination is in the best interest of the Postal Service."

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 905 F.2d 1518. The decision of the Claims Court (Pet. App. 17a-43a) is reported at 17 Cl. Ct. 47.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1990. The court's denial of a petition for rehearing was entered on July 6, 1990. The petition for a writ of certiorari was filed on September 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was awarded a contract for $9,703,878 to produce lockboxes for the Postal Service. Four other

offerors also received contracts. Each of the contracts contained an incentive provision that rewarded contractors for early delivery by payment of an additional ten percent of the price for all items delivered ahead of schedule. Pet. App. 2a, 18a. The contracts were also subject to the following "termination for convenience" clause:

> The performance of work under this contract may be terminated by the Postal Service in accordance with this clause in whole, or from time to time in part, whenever the Contracting Office shall determine that such termination is in the best interest of the Postal Service.

Pet. App. 20a.

2. An unsuccessful offeror for the same contract, Doninger Metal Products Corp., did not receive an award because the contracting officer found that it was not a responsible offeror. Doninger filed suit in the United States District Court for the District of Columbia seeking an injunction requiring termination of the contracts awarded under the solicitation, award of a contract to it, or issuance of a new solicitation. Pet. App. 2a-3a, 18a. The Postal Service promptly notified petitioner of Doninger's lawsuit and enclosed copies of the pleadings. Yet petitioner did not intervene in or attend the proceedings in Doninger's case. Pet. App. 3a, 18a-19a.

The district court held that the contracting officer's finding of non-responsibility was the product of an improper *de facto* suspension of Doninger. The court ordered:

> [D]efendant United States Postal Service shall forthwith suspend the performance of so much of the contracts awarded pursuant to [the solicitation] as would have been awarded to [Doninger] * * * had [Doninger's] offer been accepted in full and award an

> aluminum door lockbox contract to [Doninger] in accordance with that offer.

Pet. App. 55a-56a. As a result of that order, the Postal Service issued a stop work order to petitioner by telex three days after the order was entered. Pet. App. 3a, 19a. Fifteen days later, the Postal Service terminated petitioner's contract, invoking the convenience termination clause. Pet. App. 3a, 20a.

3. Petitioner submitted a certified claim for $112,639.09 for incentive payments on lockboxes shipped after petitioner received notice that its contract had been terminated. Pet. App. 3a, 20a. The contracting officer denied petitioner's claim, but allowed an incentive payment of $25,456.10 for goods actually delivered prior to contract termination. Pet. App. 3a, 21a. Following a series of negotiations, the parties executed a settlement agreement covering petitioner's convenience termination claim. The settlement agreement provided for payment to petitioner of $3.4 million. Pet. App. 4a, 21a. Petitioner reserved a claim for $630,767 for delivery incentives for lockboxes petitioner claimed it would have delivered early had its contract not been terminated. *Ibid.* When petitioner submitted its $630,767 claim, it was denied by the contracting officer. Pet. App. 4a, 22a.

4. Petitioner appealed to the United States Claims Court. On cross-motions for summary judgment, the Claims Court granted the Postal Service's motion and dismissed petitioner's complaint. Pet. App. 17a.

The court rejected petitioner's claim that the contracting officer had never made a determination that termination of the contract was in the best interests of the Postal Service, and that no valid termination for convenience had therefore occurred. Pet. App. 29a-35a. The court found that, although portions of the contracting officer's testimony could be seen as ambiguous if read in isolation

(Pet. App. 39a), the testimony considered in full was "direct, forthcoming, internally consistent, and consistent with the other evidence of record" and showed that the officer "considered termination of [petitioner's] contract to be in the Postal Service's best interest." Pet. App. 32a.

The Claims Court also rejected two contentions based on petitioner's reading of *Torncello* v. *United States*, 681 F.2d 756 (1982) (en banc). First, petitioner claimed that the termination for convenience was invalid because "the act that form[ed] the alleged basis for the termination could be said to be *reasonably foreseeable* at the time of the contract." Pet. App. 35a (emphasis added). The Claims Court held that reasonable foreseeability was irrelevant in this contract case; instead, the Postal Service could invoke the convenience termination clause if "the events that provoke the government's conclusion that termination is in its best interest [are] unexpected, *i.e.*, inconsistent with the assumptions of the parties when they entered the contract." Pet. App. 40a-41a. In this case, the court found, "there can be no dispute that the *Doninger*, decision, which was the cause of the termination, was not expected by the parties at the time of the contract." Pet. App. 41a.

Petitioner also claimed that the termination was invalid because it was the result of the Postal Service's allegedly bad-faith conduct that had led to the *Doninger* injunction. Pet. App. 35a. Rejecting this claim as well, the Claims Court found that the Postal Service had not acted in bad faith toward petitioner, and that therefore any bad-faith conduct toward a third party—*i.e.*, Doninger—would not preclude the Postal Service's termination for convenience of petitioner's contract. Pet. App. 42a.

5. The Federal Circuit affirmed. Pet. App. 1a, 8a. The court agreed with the Claims Court's determination that there was no genuine dispute that "[t]he contracting officer

considered termination of [petitioner's] contract to be in the best interest of the Postal Service." Pet. App. 4a-5a. The court of appeals also agreed with the Claims Court that the convenience termination clause may be invoked when an event has occurred that was not within the expectations of the parties at the time of the contract, and that the *Doninger* injunction was just such an "unanticipated change in circumstances, not merely justifying but compelling termination of the contract." Pet. App. 8a. Finally, the Federal Circuit rejected petitioner's argument that the Postal Service's alleged bad faith precluded reliance on the convenience termination provision. Pet. App. 7a. Holding that *Torncello* "has nothing to do with the case" (Pet. App. 6a), the court rejected petitioner's argument that "the illegality of the Postal Service's actions *against Doninger*, not against [petitioner], prohibits the termination of [the] contract, notwithstanding the district court's order to do just that." Pet. App. 7a.

ARGUMENT

1. Petitioner argues that the Postal Service is to be treated like any commercial entity. Pet. 10-13. From that premise, petitioner concludes that the courts below erred in applying the legal principles concerning interpretation of the "termination for convenience" clause to this case, rather than the body of law concerning impossibility in the performance of contracts.

Petitioner's argument is faulty. First, it is clear that the Postal Service is not to be treated for all purposes like a private entity. Second, even if the Postal Service were treated like a private entity, the result and virtually all of the reasoning of the courts below would not be altered.

a. The Postal Service was created by Congress as an independent establishment in the Executive Branch, 39

U.S.C. 201. When it enters into contracts, the Postal Service is subject to both the Tucker Act, 28 U.S.C. 1346, 1491 (see *Butz Engineering Co.* v. *United States*, 499 F.2d 619 (Ct. Ct. 1974)), and the Contract Disputes Act of 1978, 41 U.S.C. 601-613. Several statutory provisions that apply to government contracts in general are specifically applicable to Postal Service contracts. 39 U.S.C. 410(b). While the Postal Service has authority to promulgate its own procurement regulations, 39 U.S.C. 401, 410, regulations in effect at the time of petitioner's contract were quite similar to the procurement regulations promulgated by the Department of Defense and the General Services Administration. Therefore, for purposes of contracting, the Postal Service is governed by principles of government contract law that apply to the rest of the federal government.

Petitioner's claim that the decision below conflicts with *Loeffler* v. *Frank*, 486 U.S. 549 (1988), is incorrect. In *Loeffler*, this Court held that a Postal Service employee was entitled to prejudgment interest as a part of a backpay remedy under Title VII. *Id.* at 565. The decision rested upon the specific interaction between the provisions of Title VII and the Postal Reorganization Act of 1970. *Loeffler* does not hold that, for contracting purposes, the Postal Service is to be treated as a private business. There is nothing in *Loeffler* that conflicts with the lower courts' decisions in this case.

Petitioner's argument that the Postal Service is a completely private business because it competes in certain areas with other businesses is also flawed. The Private Express statutes, 39 U.S.C. 601-606, 18 U.S.C. 1693-1699, prohibit the carriage of letters outside the Postal Service's mail system. These prohibitions are enforced by means of duly promulgated regulations. 39 C.F.R. 310.1-310.7. In addition to certain specific exceptions to the Private

Express statutes, 39 C.F.R. 310.3, the Postal Service, in accordance with 39 U.S.C. 601(b), has acted to suspend the operation of the statutes when the public interest so requires. Examples of suspension of the Private Express statutes include suspension for extremely urgent letters, 39 C.F.R. 320.6, for advertisements accompanying parcels or periodicals, 39 C.F.R. 320.7, for international remailing, 30 C.F.R. 320.8, for certain letters of colleges and universities, 39 C.F.R. 320.4, and for certain data processing materials, 39 C.F.R. 320.2-320.3. The fact that the resulting competition is a creature of the Postal Service's own regulations militates against petitioner's contention that the Postal Service is a completely private activity. "Congress may have launched the USPS into the commercial world, but it did not send it off to fly alone." *Allied Coin Investment, Inc.* v. *United States Postal Service*, 673 F. Supp. 982, 985 (D. Minn. 1987).

b. In any event, petitioner entirely ignores the fact and significance of the convenience termination clause in the contract at issue, a clause whose application to the facts of this case was at the heart of the result reached by both courts below. Contrary to petitioner's contention, the question whether the Postal Service could terminate the contract was not controlled by the "familiar rule of contract law * * * that it is a defense to an action for breach if performance has been rendered impossible." Pet. 11. See also Pet. 16, 19-20, 25, 28. Rather, the Postal Service's ability to terminate the contract was governed by the clause providing that "[t]he performance of work under this contract may be terminated * * * whenever the Contracting Officer shall determine that such termination is in the best interest of the Postal Service." Pet. App. 20a.

Had such a convenience termination clause been found in a private contract, the result in this case would have been exactly the same. The presence of this clause would

not have rendered the contract invalid for lack of consideration because, as the Claims Court found, there was more than adequate consideration to support the mutual promises that the parties made. Pet. App. 39a n.8, 40a-41a. Perhaps it was unwise for petitioner to enter into a contract with a provision of this nature. Having done so, however, petitioner is bound by its terms. Because the conclusion reached by both courts below follows from this provision in the contract—not from the Postal Service's status as a governmental entity—the Postal Service's governmental status is simply beside the point.

2. Petitioner's remaining arguments are mistaken and, in any event, would not—even if correct—lead to the conclusion that the Federal Circuit's interpretation of the convenience termination clause in light of the facts of this particular case warrants further review.

Petitioner argues that it had no duty to intervene in the *Doninger* case and is not bound by the result. Pet. 14. Neither the Claims Court nor the Federal Circuit asserted that petitioner had a duty to intervene or was "bound" by the result in *Doninger*, and petitioner's citation to *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989), therefore misses the mark. Had petitioner intervened in *Doninger*, petitioner could perhaps have affected the result in that case, thus rendering the Postal Service's termination of its contract unnecessary. Indeed, having entered into a contract that permitted the Postal Service to terminate performance when it was in the Service's best interests to do so, petitioner should have realized that it had a stake in the *Doninger* case, as in the development of any other circumstance that could lead to a determination that continued performance of petitioner's contract was not in the Postal Service's best interests. The only significance of petitioner's failure to intervene was that petitioner thereby

lost its opportunity to influence whether circumstances leading to a termination would occur.

Petitioner argues that the district court's order in *Doninger* to "suspend * * * performance" of the contract did not require termination. Pet. 15-16. As discussed above, the issue in this case is not whether the Postal Service was required to terminate the contract,[1] but rather whether the Postal Service found itself in a sufficiently altered position that termination was in its best interests. Therefore, the precise intepretation of the *Doninger* injunction is irrelevant to the result reached in this case. See Pet. App. 32a-34a.

For similar reasons, petitioner's claim that the Postal Service failed to take affirmative measures to avoid breaching petitioner's contract is irrelevant. Pet. 25-27. The question whether the Postal Service could have found some means to avoid terminating petitioner's contract, although possibly relevant if the Postal Service had asserted a defense of impossibility in this case, is of no consequence where the termination of the contract need only be justified as in the "best interests" of the Postal Service. It should be noted that any other conclusion would have the unfortunate effect of requiring the government to take appeals it believed otherwise unwarranted in order to rely on the convenience termination clause, thus leading to needless litigation in the courts of appeals.

Petitioner also renews its contention that the injunction was entirely the Postal Service's fault and was foreseeable at the time the Postal Service concluded the contract with

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[1] Petitioner does not dispute that the district court had the authority to order the termination of a contract improvidently awarded. See, *e.g.*, *Sea-Land Service, Inc.* v. *Brown*, 600 F.2d 429, 434 (3d Cir. 1979); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1299-1303 (D.C. Cir. 1971).

petitioner. Pet. 19-25. The courts below correctly found that the appropriate standard for assessing a termination was not whether the fact supporting the termination was reasonably foreseeable, but rather whether there was an "unanticipated change in circumstances." Pet. App. 8a. The determination of both courts that the Postal Service entered into the contract with petitioner with every intention of honoring it—and that, indeed, it was honored for over a year and petitioner was paid nearly $5 million before it was terminated (Pet. App. 2a)—is a correct ruling on the undisputed facts of this case, and would not in any event warrant further review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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